



**Statement of Bradley Myers, Randy H. Lee Professor of Law at the
University of North Dakota and Uniform Law Commissioner,
in support of HB 1077 to adopt the Uniform Electronic Wills Act.**

Chair Klemin and Members of the Committee:

I am Bradley Myers, and I have the honor of serving as one of North Dakota's Commissioners to the National Conference of Commissioners on Uniform State Laws. I am also on the faculty of the University of North Dakota School of Law. I am not representing the School of Law today and nothing I say should be considered to be on behalf of the School of Law or the University of North Dakota.

Thank you for considering HB 1077, a bill to adopt the Uniform Electronic Wills Act. This act is a modernization of the law of wills and will allow North Dakotans to create and execute wills online.

As a general matter, North Dakota law has recognized most types of electronic documents for many years. Wills are the exception. Traditionally a will was only recognized as valid if it was written on a tangible material (usually paper), signed by the testator, and also signed by two witnesses. Since 2009, North Dakota has also recognized wills acknowledged by a licensed notary, instead of witnesses. These rules help a probate court determine whether a will is genuine if someone challenges its validity. Because the testator is deceased when the court must determine validity, the witnesses or the notary can verify that the testator was of sound mind, and signed the document willingly, without coercion or undue influence.

The Uniform Electronic Wills Act preserves these important safeguards, while allowing the use of modern technology. Under the act, the testator can create a will using a computer, and store it as a digital file. The testator must still sign the document electronically, and it still must be acknowledged by two witnesses or a notary.

This new law will work seamlessly with North Dakota's remote notarization law, enacted in 2019. That statute allows a notary to acknowledge documents online, using electronic procedures to verify the signor's identity, and using videoconferencing software to create an audio-visual record of the execution ceremony. Online notaries can create secure, tamper-evident files that cannot be altered after execution, unlike paper wills which are more susceptible to forgery and fraudulent replacement of pages.

The act also provides for self-proving electronic wills. These wills include sworn affidavits by the witnesses or notary confirming that the testator intended the document to be his or her last will and testament, that the testator was of sound mind when the will was signed, and that the testator signed

willingly, without coercion or undue influence. This simplifies the process of admitting a will to probate in uncontested cases.

The ongoing pandemic has created a greater need for online services, including estate planning services. The Uniform Electronic Wills Act will allow North Dakota attorneys to serve their clients remotely, without the need for an in-person meeting to sign documents. The act is drafted using language that should not need updating to deal with future advances in technology.

I would like to point out two differences between HB 1077 and the UEWA adopted by the Uniform Law Commission. First, the bill does not contain the optional “harmless error” provision. This provision would allow a court to treat an electronic will that was not properly executed as one that was properly executed if the court determined by clear and convincing evidence that the testator intended the document to be his or her will. A similar provision is part of the Uniform Probate Code as adopted by the Uniform Law Commission. When the legislature considered the harmless error provision as part of its consideration of the Uniform Probate Code, it decided not to adopt the harmless error provision. One of the goals of the UEWA is to treat electronic wills in the same way as all other wills. A harmless error provision, if adopted, should apply to both electronic and non-electronic wills.

The second difference concerns the question of whether witnesses must be physically present when the testator signs or acknowledges a will or whether they may be electronically present. UEWA as adopted by the Uniform Law provides language that specifically provides whether a witness can do so electronically. Again, because the Uniform Probate Code as adopted in North Dakota does not similarly provide guidance for witnesses for non-electronic wills, the language regarding physical and/or electronic presence is omitted in HB 1077 to maintain consistency under North Dakota law. I note that North Dakota’s Uniform Probate Code does not expressly prohibit witnesses from doing so remotely, but a court could interpret the current ambiguous language that way.

In summary, HB 1077 will update the law of North Dakota with a statute more suitable for the 21st century. The law will allow North Dakotans to create secure wills online, using the same technology that is already used to execute contracts, deeds, and other legal documents. I thank you for your consideration of this act, and I welcome any questions from the committee.